

IT(IT)A No.1190 & 1295/Bang/2014,
IT(IT)A No.97/Bang/2019, IT(IT)A No.949 & 950/Bang/2017
M/s. Google India Pvt. Ltd., Bangalore

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

IT(IT)A No.1190/Bang/2014
Assessment Year: 2013-14

M/s. Google India Pvt. Ltd. No.3, RMZ Infinity Tower E 4 th Floor, Old Maras Road Bangalore 560 016 PAN NO : AACCG0527D	Vs.	The JDIT (Intl. Taxation) Range-1 Bangalore
APPELLANT		RESPONDENT

IT(IT)A No.1295/Bang/2014
Assessment Year: 2013-14

Deputy Commissioner of Income-tax (Intl. Taxation) Circle-1(1) Bangalore	Vs.	M/s. Google India Pvt. Ltd. No.3, RMZ Infinity Tower E 4 th Floor, Old Maras Road Bangalore 560 016
APPELLANT		RESPONDENT

IT(IT)A No.97/Bang/2019
Assessment Year: 2016-17

M/s. Google India Pvt. Ltd. Bangalore 560 016	Vs.	Deputy Commissioner of Income-tax (Intl. Taxation) Circle-1(1) Bangalore
APPELLANT		RESPONDENT

IT(IT)A Nos.949 & 950/Bang/2017
Assessment Year: 2014-15 & 2015-16

M/s. Google India Pvt. Ltd. Bangalore 560 016	Vs.	Deputy Commissioner of Income-tax (Intl. Taxation) Circle-1(1) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Shri Percy Pardiwala, Senior Counsel, Mr. Anmol Anand, A.R., Ms. Priya Tandon, A.R. & Mr. Mithel Reddy, A.R.
Respondent by	:	Smt. Susan D. George, D.R.

Date of Hearing	:	14.12.2022
Date of Pronouncement	:	15.12.2022

ORDER

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

In these appeals IT(IT)A No.1190/Bang/2014 and IT(IT)A No.1295/Bang/2014 are cross appeals for the assessment year 2013-14 and IT(IT)A Nos.97/Bang/2019, 949 & 950/Bang/2017 are appeals by the assessee for the assessment years 2014-15 to 2016-17, wherein the issue in all these appeals are common in nature, hence, these are clubbed together heard together and disposed of by this common order for the sake of convenience.

2. Mostly the grounds of these appeals are common in nature and hence for brevity, we consider the IT(IT)A No.1190/Bang/2014, which is the assessee's appeal and the grounds raised in this appeal are as follows:

“Based on the facts and in the circumstances of the case, the Ld CIT(A) and the Ld AO have:

- 1 Erred in holding the payment made by the Appellant to Google Ireland Limited in relation to purchase of advertisement space for resale to the advertisers in India under the Google AdWords Reseller Agreement ('the Agreement') to be in the nature of 'Royalty' under the Act and the India-Ireland Double Taxation Avoidance Agreement (**India-Ireland Treaty**) stating that the issue is covered under the appeals for earlier years.*
- 2. Erred in holding that the amount payable towards purchase of advertisement space to be in the nature of 'Royalty' under the Act, even after acknowledging that the Appellant is distributing/reselling the advertisement space to the advertisers in India.*
- 3 Erred in holding the amount payable by the Appellant to Google Ireland Limited as Royalty by attributing the same towards right to use of Trademark, even after concluding that the assessee company was permitted to use the trademarks of Google for the purpose of marketing and distribution of AdWords program.*
- 4 Erred in holding that the AdWords program is complex computer software. the right to use has been granted to the Appellant without appreciating the fact that AdWords program is a standard advertisement service through which the advertiser is able to advertise its products or services on the Google website.*
- 5. Erred in holding that Google Ireland Limited has granted the Appellant the right to use of the AdWords program, which is a complex computer program without parting with the copyright. thus granting license to use the software without appreciating the fact that the Appellant is only involved in marketing and distribution/resale of the advertisement space to the advertisers in India.*
- 6. Erred in holding that the training provided in relation to the advertisement program. its functionality. tools available etc. to the distribution team of the appellant who markets and distributes the same to advertisers in India tantamount to rendering of services to the Appellant even after concluding that such training is restricted to use of the AdWords program and not how to develop the AdWords program.*
- 7 Erred in confirming that the distribution rights granted under the distribution/ reseller agreement are itself "IP rights" covered by "similar property" used in Sec 9(1)(vi) of the Act, after holding that as per the distribution/reseller agreement Google Ireland Limited has*

agreed to provide advertisement space to the Appellant through AdWords program for distribution to the Indian Advertisers.

8. *Erred in confirming that Distribution Agreement/Reseller Agreement cannot be read without the service agreement (ITES agreement) between the Appellant and Google Ireland Limited and the Appellant has been granted right to use intellectual property owned by Google Ireland Limited without appreciating the fact that ITES service agreement is a separate agreement under which the Appellant performs an independent global outsourcing function for Google Ireland Limited for which it receives arm's length consideration and is not linked in any manner to the function of sale of advertisement space to the Indian advertisers being performed by the Appellant.*
9. *Without appreciating the facts of the case, erred in holding that the amount payable by the Appellant to Google Ireland Limited towards purchase of advertisement space to be in the nature of 'Royalty' under Section 9(1)(vi) of the Act.*
10. *Erred in upholding the order of the Ld JDIT that the amount payable by the Appellant to Google Ireland Limited is towards right to use of trademark and copyrighted computer program and process, hence is in the nature of 'Royalty as per the Article 12 of the India Ireland Double Taxation Avoidance Agreement.*
11. *Erred in not following the principle laid down by Hon'ble Mumbai Tribunal in the case of Yahoo India Pvt Ltd (140 TTJ (Mumbai) 195) and Pinstorm Technologies Pvt Ltd (2012) 54 SOT 78 (Mumbai) on similar facts by stating that the facts and issues are completely different and at no stage the Mumbai Tribunal consider what exactly is the AdWords Program. nor did it have occasion to examine the right to use trademark or other IP rights.*
12. *Erred in not following the decision of the Calcutta Tribunal in the case of Income Tax Officer vs Right Florists Pvt Ltd (ITA No.1336/Ko1/2011) on similar facts.*

3. The grounds raised by the revenue in IT(IT)A No.1295/Bang/2014 are as follows:

1. *“The learned CIT (Appeals) has erred in partly allowing the appeal of the assessee which is opposed to law, equity, facts and circumstances of the case.*

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2. *The learned CIT (A) erred in fact by not appreciating the Assessing Officer's conclusion based on the material available on the record that the Google Ireland Limited (GIL) is not the beneficial owner of the Royalties paid by the Google India Private Ltd(GIPL)*
3. *The learned CIT (A) erred in fact and law by holding that the M/s.Google Ireland Limited (GIL) is the beneficial owner of the royalties paid by the GIPL and the rate of TDS is at 10.556%.*
4. *The learned CIT (A) erred in not appreciating the reliance of the AO in the statement made under Oath before the Public Accounts Committee, House of Commons, British Parliament by Mr. Matt Brittin of Google UK Ltd and the various articles appearing in WWW, which shows that the transaction of assessee company constitutes a colourable device.*
5. *The learned CIT (A) erred by not considering the fact that onus is on the assessee to establish with the reliable documentary evidence that the recipient (GIL) is the beneficial owner of royalty.*
6. *The learned CIT (A) has not appreciated the Assessing Officer's reliance on the agreements entered between the entities to decide the beneficial owner of the Royalties which were neither produced before the AO nor the Ld.CIT(A)*

4. The assessee has raised additional grounds in IT(IT)A No.1190/Bang/2014 as follows:

Withholding liability on Royalty to arise only on payment basis under the India-Ireland Double Taxation Avoidance Agreement ('DTAA')

3. *Without prejudice to the argument that the payments made by the Appellant to Google Ireland are not in the nature of Royalty as per Article 12 of India-Ireland DTAA, the Learned Assessing Officer / Learned Commissioner of Income-Tax (Appeals) erred in holding that the Appellant is liable to withhold tax on amounts payable to Google Ireland disregarding that 'Royalty' income for a non-resident is taxable only on receipt basis under the India-Ireland DTAA.*
5. The assessee has also filed a petition for admission of additional ground and we admit the additional grounds as in our opinion, all the facts are already on record and there is no necessity of investigation of any fresh facts for the purpose of adjudication of

above ground. Accordingly, by placing reliance on the judgement of Hon'ble Supreme Court in the case of NTPC Vs. CIT 229 ITR 383 (SC) we inclined to admit the additional ground for the purpose of adjudication as there was no investigation of any fresh facts otherwise on record and the action of the assessee is bonafide.

6. Facts of the case are that the assessee company, Google India Pvt. Ltd. (GIPL), having its registered office at Bangalore was incorporated on 16.12.2003 as a wholly owned subsidiary of Google International LLC, US. GIPL or Google India is engaged in the business of providing Information Technology and Information Technology Enabled services to its Group companies. Further Google India also acts as a distributor for Adwords program in India. The company's activities could be classified into the following segments.

IT services :- GIPL has entered into a service agreement with Google Inc to render software development services. Google India's research and development units at Bangalore, Hyderabad and Gurgaon provide IT services including application development, maintenance and testing services. For these services, GIRL, is remunerated at cost plus 17.5%

IT enabled services :-GIPL has entered into a service agreement with Google Ireland Limited (Google, Ireland) to render IT enabled services. Its service centre at Hyderabad and Gurgaon provides IT enabled services relating to the administration of advertisements in accordance with the guidelines provided by Google Ireland and provide customer support services. For these services, GIRL is remunerated at cost plus 15.5%.

Marketing and distribution services for the Ad Words

program :- Under the Google AdWords Program Distribution Agreement dated 12.12.2005 (Agreement) entered into between GIPL and Google Ireland, Google India is appointed as a non-exclusive authorized distributor of AdWords program to the advertisers in India.

6.1 With respect to the issue regarding payments made by the assessee to Google Ireland Ltd., being held to be Royalty under the Act read with the Treaty and liability to withhold tax fastened on the assessee, the assessee's representatives fairly conceded before the Id CIT(A) that the issue is covered by CIT(A)'s earlier year order for assessment years 2006-07 to 2012-13. Following his earlier decision, the Id CIT(A) confirmed the action of the AO.

7. Further, the AO has observed that M/s. Google Ireland was not beneficial owner of the amount received from the assessee in relation to royalty amount. The Ld. CIT(A) observed that in relation to characterization of amounts payable to M/s. Google Ireland as royalty by placing reliance on earlier order of the Id. CIT(A) in assessment years 2007-08 to 2012-13 in relation to contention of AO that M/s. Google Ireland is not beneficial owner of receivable from M/s. Google India Ltd., the Id CIT(A) has rejected the same and upheld that M/s. Google Ireland is beneficial owner of the sums received from M/s. Google India Ltd. under the reseller agreement. Aggrieved by the order of the Id. CIT(A), assessee is in appeal before this Tribunal on the issue of characterisation of the amount payable to M/s. Google Ireland as royalty and the revenue is in appeal before us in relation to issue as to whether M/s. Google Ireland is

the beneficial owner of the amount received from M/s. Google India Ltd.

8. We have heard the rival submissions and perused the materials available on record. Admittedly, this issue came for consideration before this Tribunal in assessee's own case in IT(TP)A No.1513 to 1516/Bang/2013 for the assessment years 2009-10 to 2012-13, the Tribunal vide order dated 19.10.2022 held as under:

13. We have heard rival submissions and perused the material on record. The issues involved in these appeals revolve around the taxability of payments received by GIL from the assessee, who is engaged in the business of online advertisement space to advertisers in India. The Revenue had sought to characterize these payments received by GIL to be royalty as defined in section 9(1)(vi) of the I.T.Act r.w. Article 12(3) of the India-Ireland Double Taxation Avoidance Agreement (India-Ireland DTAA) and thus chargeable to tax in India in the hands of GIL. The case of the assessee is that the said payments are in the nature of business profits, which are chargeable to tax in Ireland and not in India. Further, since the Department in these proceedings has never alleged that GIL had a Permanent Establishment (PE) in India in terms of Article 5 and accordingly by virtue of Article 7(1) of the India-Ireland DTAA, the right to tax these profits is solely with Ireland. Consequently, the assessee cannot be held to be an assessee in default u/s 201 of the I.T.Act for not deducting tax at source u/s 195 of the I.T.Act while making the subject payment to GIL.

14. For a proper adjudication of the above issue, it is necessary to briefly explain / examine the overview of the Google Adword Program, the role of the assessee under Adword Program distribution agreement and the service agreement (ITES). The undisputed fact on record is that Google.com is a search engine developed by Google LLC, USA available freely to the world at large providing information on any subject based on the search made by the user. The link to various websites related to the search are provided in the search result. Additionally, Google LLC, USA has also developed a computerised advertising program known as Google AdWords Program. Google Ireland Ltd (GIL) is the exclusive licensee and principal operator of the computerised advertising program i.e., "Google AdWords Program" for the whole world outside the USA. The Google AdWords program displays advertisements on Google's search engine. It has a separate website in which the advertisers have to agree to certain terms and conditions including the consideration payable for the targeted Advertisements and provide appropriate keywords on searching of which the websites of the advertisers would be displayed on top of the Google search engine with the abbreviation "Ad". For instance, pursuant to the search query

"Fresh Flower Delivery", website of "Ferns N Petals" is listed two times among websites of various other businesses. The listing of the website of "Ferns N Petals" at the top of the list is a sponsored link accompanied by a small abbreviation "Ad", and the other listing is an organic search result as it does not have any such abbreviation. [Page 318 of paper book 1] This is because, "Ferns N Petals" utilised the "Google AdWords Program" to advertise its business on the Google Search Engine. The targeting of advertisement is achieved by using appropriate keywords, which can be selected only by the Advertiser. The Google AdWords Program contains a glossary of keywords together with helpful suggestions for the Advertiser to select appropriate keywords for his targeted advertisement. Google AdWords Program also contains a number of computer commands, by which the proposed Advertiser can achieve a more focused and particularised targeting, such as geographical or area targeting (advertisement to be shown only in a particular area, say the State of Karnataka) or period targeting (advertisement to be shown only in a certain period) or time targeting (advertisement to be shown only at certain fixed times during the day) or duration targeting (to be shown only for a fixed time duration each time). All these types of targeting are over and above the usual subject targeting and are achieved by simple computer commands, given by the proposed Advertiser on the Google AdWords Program. All these facilities are available on the Google AdWords Program to any member of the public, free of charge, to enable him to formulate a suitable draft advertisement for his product or service. The only requirement is that the proposed Advertiser should have a website of his own / or entity giving particulars about his/ its business. The Google AdWords Program itself gives step-by-step and detailed instructions, so that even a person who has a basic knowledge of computers and internet can create a draft advertisement and target it suitably by using the necessary computer commands (or tools). No payment is made for any use of the Google AdWords Program. After formulating the draft advertisement, the Advertiser is required to upload the same for display on Google Search Engine or other online properties using the Google AdWords Program. No payment is made for the same. Thereafter, the proposed advertisement is stored on the servers of Google Ireland Ltd (GIL) located outside India for undergoing a review process.

15. The review process is undertaken by GIL for advertisements uploaded by Advertisers from all around the world including India. Approximately 94% of global advertisements are reviewed by GIL through its automated system located outside India. Remaining global advertisements, which are not successfully reviewed by the automated system, are subjected to a manual review. For carrying out manual review, the balance 6% (approx.) global advertisements are forwarded to one of service centres of GIL's group entities, located in USA, Dublin, China, Korea, Japan, and India. An advertisement in English by an Indian Advertiser may go for manual review to any of these service centres. These service centres carry out the activity of manual review on a cost-plus basis. The assessee also carries out this activity under the ITES segment as per the services agreement dated 1.4.2004 entered into with GIL. The relevant terms and conditions of this agreement are as under:

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THIS SERVICES AGREEMENT ("Agreement") is entered into as of 1st April, 2004 (the "Effective Date"), by and between Google Ireland Limited, a corporation organized under the laws of Ireland ("Ireland") and having its office at Seagrave House, 19120 Earlsfort Terrace, Dublin 02, Ireland, and Google Online India Private Limited, a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Prestige Sigma, 1st Floor, NO.3 Vittal Mallya Road, Bangalore 560001, India ('Go ogle India') and having a branch office at RMZ Future, Block A, 4th Floor Plot No. 14, Road No.2, Hitec City Layout, Madhapur village, Ranga Reddy District, Hyderabad 500081, Andhra Pradesh.

A. WHEREAS, Google Ireland is in the business of developing, licensing, selling, marketing and supporting certain Internet search, advertising system and information organization and management technology products and services to provide information, advertising, search and related services via the Internet, corporate intranets and private networks (collectively, 'Products '); and

. WHEREAS, Google Ireland desires to avail services, relating to, information technology. Information technology enabled services and software development related services from Google India as per the terms and conditions of this Agreement; and

C WHEREAS, Google India has expertise in rendering the above services and is willing to render such services for Google Ireland as an independent contractor on the terms and conditions of this Agreement:

NOW THEREFORE, in consideration of the mutual covenants and conditions contained herein the parties agree as follows:

1. DEFINITIONS

1.1 'Affiliate' shall mean any Person, whether de Jure or de facto, that directly or indirectly participates in the capital. control or management of either party or is under common ownership with a party to this Agreement or other entity actually controlled by, controlling. or under common control with a party to this Agreement.

1.2 "Confidential Information' shall mean all data and information of a confidential nature, Including know-how and trade secrets, relating to the business, the affairs, the products. the development or other projects or services of Google Ireland or its-suppliers or its affiliate. including but not limited to Intellectual Property. Confidential Information may be communicated orally, in writing. or in any other recorded,

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electronic or tangible form. Data and information shall be considered to be Confidential Information if (i) Google Ireland has marked them as such; (ii) Google Ireland, orally or in writing, has advised Google India of their confidential nature; or (iii) due to their character or nature, a reasonable person in a like position and under like circumstances would treat them as secret and confidential. Confidential Information does not include information: (i) that is in the public domain through no fault of the receiving party, (ii) that was previously known by receiving party, as established by written records of the receiving party prior to receipt of such information from the providing party or (iii) that was lawfully obtained by the receiving party from a third party without any obligations of confidentiality to Google Ireland.

1.3 "Derivative works Work" shall mean (i) for copyrightable or copyrighted material, any modification. derivative works work (as defined in 17 USC. §101), translation, abridgment, revision or other form in which such material may be recast, transformed or adapted, (ii) for patentable or patented material, any improvement thereon. and (iii) for material protected by trade secret, any new material derived from such existing trade secret material, including new material which may be protected to copyright, patent and/or trade secret.

1.4 "Documentation" shall mean any and all information, written or otherwise, provided by Goode Ireland to Google India describing the Intellectual Property or the Products and any updated, improved or modified version(s) of such materials including information contained in published written materials, on magnetic media or communicated by electronic means.

1.5 "intellectual Property' shall mean all intellectual, proprietary, and/or intangible property rights constituting, embodied in. pertaining to, used in or with respect to the business of Google Ireland, the Products, or the provision of related services and all tangible embodiments hereof, wherever located, including but not limited to the following: (i) all trademarks, trade names, service marks, logos or trade dress, including all registrations and applications therefor; (ii) all copyrights. Moral Rights (as defined below), and other rights in works of authorship including all registrations and applications therefor; (iii) all patents and patent applications. patentable Ideas, Inventions, innovations and improvements; (iv) all know-how and trade secrets; v) all design and code documentation, methodologies, processes, design information, design flows, encoding techniques, applications, product information.

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Formulae, engineering specifications, technical data, testing procedures, drawings and techniques and other proprietary information and materials of any kind; (vi) all software programs in both source code and object code format. including all testing software and software tools: (vii) all documentation, records, databases, drafts, designs, codes, drawings and algorithms: and (viii) all confidential and proprietary information related to any of (i) through (vii) above

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1.10 "Software Embodiments" shall mean all designs, discoveries, inventions. Products. procedures, improvements, developments, drawings, notes, Documentation. information. materials, Intellectual Property and Derivative works Works made, conceived or developed by Google India alone or with others which result from or relate to the Services

1.11 "Software Technology" shall mean all Intellectual Property, Confidential Information, Documentation, Derivative works Works and other technical data used by Google Ireland that are required, used or appropriate for the design and development of Products. including the reproduction, use, testing, operation, maintenance and service of such Products.

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2. SERVICES

2.1 Request Google India hereby agrees to perform certain information technology, information technology enabled services and software development services, as requested by Google Ireland from time to time, with respect to Products, utilizing Google Ireland Software Technology and other appropriate technology from Google Ireland or third parties which may be properly used for these purposes. Google Ireland will specify the information technology, information technology enabled services and software development services to be performed, the Products to be worked on or used, the time line for completion and the specific results to be achieved (the Services").

2.2 Performance. Upon agreement between Google Ireland and Google India as to the Services and completion date for a particular Services project, Google India will perform the Services. Google India agrees to use commercially reasonable efforts to perform the Services in a timely fashion and as described to it by Google Ireland. Google India may not subcontract work under this Agreement unless specifically and

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to the extent set forth in the Services. Google India shall, at all times, be responsible for work done by its subcontractors within the scope of this Agreement as it is for work done by its own employees. At the option of Google Ireland, Google India shall make Goggle Ireland a party to the agreements that Google India may execute with its subcontractors and Google Ireland shall have the right to pre-approve the terms and conditions of such agreements

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5. OWNERSHIP

5.1 Intellectual Property. Google India acknowledges the exclusive right, title and interest of Google Ireland and its licensors and/or suppliers in and to any and all Confidential Information, Intellectual Property, Software Technology and Documentation, and Google India will not at any time do or cause to be done any act or thing impairing or tending to impair any part of said right, title and interest. Google India acknowledges and agrees that all such Confidential Information, Intellectual Property, Software Technology and Documentation shall remain the exclusive property of Google Ireland and, as applicable, its licensors and/or suppliers.

5. 2 Ownership of Derivative works Works and Software Embodiments. Google India shall keep Google Ireland promptly informed of Google India's development of any Derivative works Works and Software Embodiments and hereby irrevocably agrees that all such Derivative works Works and Software Embodiments shall forever be the sole and exclusive property of Google Ireland throughout the world from the date of its creation. As between Google Ireland and Google India no additional action shall be required to vest all right, title and ownership of such Derivative works Works and Software Embodiments in Google Ireland. Google India shall furnish to Google Ireland all such Derivative works Works and Software Embodiments developed by Google India as soon as they become available. From time to-time, promptly upon receipt of Google Ireland's request, Google India shall provide Google Ireland with assignments, in substantially the form of Exhibit B hereto to facilitate Google Ireland's perfection of its rights in the Derivative works Works and the Software Embodiments in any jurisdiction in the world. Google India shall also promptly make available to Google Ireland all Residuals. If Google India has any rights to Derivative works Works or Software Embodiments that cannot be assigned to Google Ireland under

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law. Google India hereby waives the enforcement of such rights; and if Google India has any rights which cannot be assigned or waived under law, Google India hereby grants to Google Ireland an exclusive, irrevocable, perpetual, worldwide, transferable, fully paid licence, with rights to sub license and assign, to all such rights. Google India shall enter into agreements with its Representatives sufficient to permit Google India to make the foregoing grant of rights.

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6. CONFIDENTIAL INFORMATION

6.1 Access and Use of Confidential Information. During the course of performance of this Agreement, Google Ireland will disclose certain Confidential Information to Google India solely to permit Google India to perform its obligations under this Agreement. Except as otherwise provided in this Agreement, Google India agrees that such Confidential Information shall be kept secret by Google India during the term of this agreement and after the expiration hereof Google India shall refrain from using or exploiting any and all Confidential Information for any purposes or activities other than those contemplated in this Agreement.

6.2 Agreement Not to Disclose Confidential Information. Google India shall not disclose or facilitate disclosure of such Confidential Information to any Person without the prior consent of Google Ireland, except to its Representatives, and then only to the extent necessary for the performance of the activities contemplated by this Agreement. Google India shall cause each of its Representatives with access to the Confidential Information to enter into a nondisclosure agreement in a form approved by Google Ireland. Google India shall use the highest standard of care currently employed by any developer or distributor of high technology products in order to avoid disclosure or misappropriation of such Confidential Information.

6.3 Ownership and Return of Confidential Information. All files, lists, records, documents, drawings, specifications, equipment and computer programs which incorporate or refer to all or a portion of the Confidential Information shall remain the sole property of Google Ireland or its licensors and suppliers. Such materials shall be promptly returned: (i) upon Google Ireland's reasonable request, or (ii) in accordance with

Section 12 upon termination of this Agreement, whichever is earlier.

12.5 Rights and Duties of Termination.

(a) Upon termination or expiration of this Agreement:

(i) Google India shall have the right to retain any sums already paid by Google Ireland under this Agreement and Google Ireland shall pay all sums accrued, but not yet paid, that are due under this Agreement as of the date of such termination;

(ii) Google India shall discontinue all use of the Confidential Information, Documentation, Intellectual Property and other Software Technology and shall have no further right with respect thereto.

(iii) Google India shall (except as specified in subsection (b) below) immediately return to Google Ireland or (at Google Ireland's request) destroy, all copies of the Confidential Information, Documentation and other Software Embodiments, in its possession or control. Google India hereby expressly waives and agrees not to assert any right of detention whatsoever with respect to the foregoing.'

16. Prior to December 2005, an Indian Advertiser could get into a contract with GIL only, for purchasing online advertisement space. However, to accommodate Indian Advertiser(s) desirous to pay in Indian Rupees instead of foreign currency, GIL entered into the Google AdWords Program Distribution Agreement dated 12.12.2005 with the-assessee, whereunder the assessee was appointed as a non-exclusive distributor of online advertisement space in India In terms thereof, the assessee set up its "Distribution Segment" for carrying out purchase and re-sale of online advertisement space to Indian Advertisers. However, Indian Advertisers who were willing to pay in foreign currency, continued to transact directly with GIL. The Google AdWords Program and its features remains the same whether the Advertiser in India purchases online advertisement space from GIL or its authorised distributor i.e., the assessee. The only difference is where Indian Advertiser purchases from the assessee, it pays in INR whereas where Indian advertiser purchases from GIL, it pays in foreign currency.

17. In a case where the assessee is involved in purchase and re-sale of online advertisement space to Advertiser and if such Advertiser finds it difficult to use Google AdWords Program, he can get guidance and assistance from the employees of the assessee working under the Distribution Segment. However, substantial portion of Indian Advertisers in India prepare their draft advertisements themselves, with the aid of the Google AdWords Program itself. All this is completely free and is open to any member of the public. No payment is

made for any use of the Google AdWords Program. In fact, even after using the Google AdWords Program and formulating / displaying an online advertisement, no payment is made by the Advertiser, unless the Ad is clicked by an end-user. Relevant terms and conditions of the Distribution Agreement are as under:-

'Amended and Restated Google AdWords Program Distribution Agreement.'

This Amended and Restated Google AdWords Program Distribution Agreement ("Agreement") is entered into as of December 12, 2005 (the "Effective Date") by and between Google Ireland Limited, with offices at 1st & 2nd Floors Gordon House, Barrow Street, Dublin 4 Ireland ("Google"), and Google Online India Private Limited, a company incorporated under the Indian Companies Act, 1956 and having its registered office at 1st Floor, Prestige Sigma, No. 3 Vittal Mallya Road, Bangalore 560 001 ("Distributor").

WHEREAS

- 1. Google wishes to enter into the Distribution Agreement for its AdWords Program with Distributor;*
- 2. Whereas Google Inc., a Delaware corporation, and Distributor entered into a Google AdWords Program Distribution Agreement, dated as of December 12, 2005.(the "Prior Agreement"), and Google Inc. assigned its rights and obligations under the Prior Agreement to Google; and*
- 3. Google and Distributor desire to terminate the Prior Agreement and further desire that this Agreement supersede and replace the Prior Agreement in its entirety;*

NOW, THEREFORE, in consideration of the promises and the mutual covenants, agreements, representations and warranties hereinafter set forth, Google and Distributor hereby agree as follows

1. Definitions. The following capitalized terms shall have the meanings set forth below.

1.1 "Advertiser" means an individual or business resident or having its principal place of business located within the Territory (as defined herein), where principal place of business is determined by the place of an entity's registration.

1.2 "AdWords Program" means the advertising program currently offered by Google under the name "AdWords."

1.3 "Brand Features" means the trade names, trademarks, service marks, logos, domain names, and other distinctive brand features of each party, respectively, as secured by such party from time to time.

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1.4 "Designated Contact" means those contacts designated by each party as the point of contact or contacts for a particular function area related to this Agreement.

1.5 "Google Brand Features" means the Google trade names, trademarks, service marks, logos, domain names, and other distinctive brand features, with some but not all examples at

["http://www.google.com/ippermissions/trademarks.html"](http://www.google.com/ippermissions/trademarks.html) (or such other URL that Google may provide from time to time), and such other trade names, trademarks, service marks, logos, domain names, or other distinctive brand features that Google may provide to Distributor for use solely under this Agreement.

1.6 "Intellectual Property Rights" shall mean any and all rights existing from time to time under patent law, copyright law, semiconductor chip protection law, moral rights law, trade secret law, trademark law, unfair competition law, publicity rights law, privacy rights law, and any and all other proprietary rights, as well as, any and all applications, renewals, extensions, restorations and re-instatements thereof now or hereafter in force and effect worldwide.

1.7 "Keywords" means words chosen by an advertiser through the AdWords Program for a given set of one or more advertisements that are used to target those advertisements to potential customers.

1.10 "User Data" means all data and information provided by users via the AdWords Program, including all registration data, names, email addresses, other addresses, contact information, and other identifying information.

2. Appointment of Territory and Distributor Obligations.

2.1 Appointment of Territory. Google appoints Distributor as a non-exclusive authorized Distributor of Google AdWords Program to Advertisers, all under and in accordance with the terms and conditions set forth in this Agreement. Distributor shall conduct its business for its own account, in its own name, and not as an agent, employee, partner, or franchisee of Google. Distributor may not solicit business from and shall not distribute AdWords Program to (even if unsolicited), any entity that does not have a principal place of business within the Territory. For the avoidance of doubt, an entity's principal place of business will be determined by the place of such entity's registration. All inquiries by any such entity for sale of advertising space shall be referred to the designated Google contact within three (3) business days of receipt by Distributor of such inquiry.

2.2 Distribution & Marketing of AdWords Program. Distributor agrees to market and distribute AdWords Program to Advertisers in the designated Territory, within the broad guidelines provided by Google, with its reasonable commercial expertise and own sales force and customer service

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infrastructure. Distributor shall not subcontract any of its functions or obligations under this Agreement to any third parties. Distributor shall perform its obligations hereunder in a professional and workmanlike manner consistent with reasonably applicable industry standards and in accordance with this Agreement. Distributor will distribute AdWords Program in accordance with the training provided by Google. Failure to do so would constitute a material breach of this Agreement and shall be grounds for termination under section 9.3.

2.3 AdWords Program Sign Up Process. Distributor shall be responsible for uploading all Advertiser information that is required by Google for participation in the AdWords Program.

2.4 Licences; Approvals. Distributor shall be responsible for obtaining all licences and permits and for satisfying all formalities as may be required to enter into this Agreement and to perform its obligations in accordance with then-prevailing laws and regulations, including without limitation those necessary to enable Distributor to make payments to Google in US dollars. Distributor will promptly secure all governmental approvals as may be required in the Territory or performance of its obligations under this Agreement.

2.5 Compliance with United States and Other Applicable Law; Conduct of Business. Distributor will comply with all United States and local laws and regulations applicable to the distributor of the goods and services, including but not limited to the Foreign Corrupt Practices Act and US regulations of international boycotts. Distributor shall (a) conduct business in a manner that reflects favorably at all times on the AdWords Program and on Google's goodwill and reputation, and (b) agrees to adhere to the minimum levels of service as specified in Exhibit C. Breach of this Section 2. 5 will constitute a material breach of this Agreement.

2. 6 After-Sales Support. Distributor will provide after-sales services to Advertisers in accordance with the broad instructions, training and standards of Google.

3. Google Obligations.

3.1 Advertising Space. Google agrees to provide advertising space through the AdWords Program for distribution by Distributor to Advertisers as set forth herein.

3.2 Training. Google agrees to train Distributor.

3.3 Non-Exclusivity. This Agreement shall constitute a non- exclusive relationship between Google and Distributor.

5. *Reporting Requirements.*

5.1 Information Provided by Google. Google will make available to Distributor online information about Advertiser activity, on an aggregate and individual basis. which information shall contain include (i) the total number of Keywords purchased by Advertisers, (ii) the number of impressions of Advertisers' advertisement delivered across the Google network, (iii) the number of clicks delivered across the Google network for Advertisers' advertisement an (iv) the cost of clicks delivered across the Google network for Advertisers ' advertisement. Distributor must set up AdWords Program advertising accounts in order to receive such online information. Google reserves the right, but has no obligation, to send reports about an Advertiser's activity directly to such Advertiser. If an Advertiser makes a request to Distributor to receive a user name and password to access such Advertisers individual AdWords Program account activity, Distributor' will grant such request after approval from Google.

6. Brand features. Each party shall own all right, title and interest, including without limitation all Intellectual Property Rights, relating to its Brand Features. Google grants to Distributor nonexclusive and non sub-licensable licence during the Term to display Google Brand Features solely for the purpose of Distributor's marketing and distribution of AdWords Program under the terms and subject to the conditions set forth in this Agreement. Notwithstanding the foregoing, Distributor will submit all materials of any kind containing the Brand Features) to Google for written approval prior to release to the public. Furthermore, Distributor agrees to adhere to Google's then-current Brand Features use guidelines, and any content referenced or included therein, which may be found at the following URL: <http://www.google.com/permissionslguidelines.html> (or such other URL that Google may provide from time to time) and to such other guidelines or restrictions provided by Google in writing to Distributor in connection herewith. Except as set forth in this Agreement, Distributor shall not acquire any right, title or interest in or to the Google Brand Features. All use by Google of Distributor Brand features (including any goodwill associated therewith shall inure to the benefit of Distributor and all use by Distributor of Go ogle Brand Features (including any goodwill associated therewith) shall inure to the benefit of Google. No party shall challenge or assist others to challenge the Brand Features of the other party (except to protect such party's rights with respect to its own Brand Features) or the registration thereof by the other party, nor shall either party attempt to register any Brand Features or domain names that are confusingly similar to those of the other party.

7. Confidentiality; Limitation on Public Announcements. Disclosure of confidential and/or proprietary information disclosed hereunder, including the User Data (including any aggregated User Data), the existence and content of

this Agreement, and any information provided pursuant to this Agreement, shall be governed by the Google Standard Mutual Non-Disclosure Agreement (introductory paragraph and Sections 1 through 12, inclusive), executed by the parties prior to or concurrently with this Agreement (the "NDA "), which is attached hereto as Exhibit B, and which is incorporated by reference herein. Each party acknowledges and agrees that it will obtain the other party's prior written approval, which shall include approval of any proposed text, before making any public announcements or communication, including, but not limited to, any press releases, online publishing or direct mailings concerning or related to the existence or terms of this Agreement. In addition. Distributor agrees to waive all claims against and release Google (and its affiliates, partners and representatives) from any claims or losses in connection with any above publications made by Google.

4. User Data. Google owns all right, title, and interest in and to all information and data, including the User Data collected by Google relating to Advertisers in connection with the provision of the AdWords Program. Distributor shall maintain all User Data in accordance with local law and regulation applicable to such data. and shall implement policies and procedures with respect to the User Data that are at least as protective of the rights of the Advertisers as is provided in the Google Privacy Policy set forth at <http://www.google.com/privacy.html> and all relevant policies implied therein

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9.4 Effect of Termination. Upon any termination or expiration of this Agreement, (i) all rights and licences granted by one party to the other. including but not limited to rights to use the other party's Brand Features shall cease immediately, (ii) each party shall promptly return to the other party, or destroy and certify the destruction of all Confidential Information as defined in the NDA and Section 7 of this Agreement) of the other party, and (iii) except for a termination pursuant to Section 9.2 or Section 9.3 above. Google will continue to serve advertisements as provided in this Agreement up to the earlier date to occur of (x) the date that the services provided by Google exhaust any amounts prepaid by Distributor, or (y) the date that is thirty (30) days after expiration or termination of the Agreement. Termination or expiration of this Agreement. in part or in whole. shall not limit either party from pursuing other remedies available to it, nor shall Distributor be relieved of its obligation to pay all charges that have accrued or are otherwise owed under this Agreement. Termination of this Agreement does not prevent Distributor from participating in the AdWords Program pursuant to the general terms and conditions made publicly available by Google from time to time in its sole discretion.

EXHIBIT C

Service Level Agreement

Distributor shall be solely responsible for providing all customer services to Advertisers, according to the procedures, and in compliance with standards, provided by Google. All Advertisers shall be instructed by Distributor to contact Distributor directly for support and not to communicate directly with Google.

Distributor agrees that it shall provide at least the following minimum levels of service: Business hours phone support to all Advertisers.

E-mail queries from Advertisers shall be responded to within one (1) business day with immediate resolution of any issues when possible.

Issues that cannot immediately be resolved by Distributor based on training and procedures provided under the Agreement must be communicated promptly to Google by Distributor and Google will assist Distributor in determining the best solution.

Google agrees that it shall provide at least the following minimum levels of service to Distributor:

Customer Queries (as defined below), up to the E-Mail Escalation Limit (as defined below), shall be responded to within one (1) business day

"Customer Queries" shall mean e-mails sent from Distributor to Google related to Advertiser issues, but excluding general communications between Distributor and Google (e.g. billing questions, training information) and technical issues that only Google can solve.

"E-Mail Escalation Limit" shall equal five (5) e-mails per month for everyone hundred (100) Advertisers serviced by Distributor, provided, however that the E-Mail Escalation Limit shall only apply beginning thirty (30) days after the completion of tile training.

Timing for responses to Customer Queries from Distributor beyond the E-Mail Escalation Limit shall be at Google's sole discretion.

Distributor agrees that Google will have the right, to review samples of communications sent to Advertisers to assess the quality of responses and modify communications accordingly. Google shall also have the right to send questionnaires to Distributor's customers to ensure that Distributor is providing an adequate level of service.

Mutual Non-Disclosure Agreement

This Mutual Non-Disclosure Agreement ("Agreement") is made and entered into between Google Ireland Limited, for itself and its subsidiaries and

affiliates ("Google"), and "Participant" identified below, individually referred to as a "Party" and collectively referred to as the "Parties". The Parties wish to exchange Confidential Information (as defined below in Section 2) for the following purpose(s): a) to evaluate whether to enter into a contemplated business transaction; and b) if the Parties enter into an agreement related to such business transaction, to fulfill each Party's confidentiality obligations to the extent the terms set forth below are incorporated therein (the "Purpose"). The Parties have entered into this Agreement to protect the confidentiality of information in accordance with the following terms:

- 1. The Effective Date of this Agreement is December 12, 2005.*
- 2. In connection with the Purpose, a Party may disclose certain information it considers confidential and/or proprietary ("Confidential Information") to the other Party including, but not limited to, tangible, intangible, visual, electronic, present, or future information such as: (a) trade secrets; (b) financial information, including pricing; (c) technical information, including research, development, procedures, algorithms, data, designs, and know-how; (d) business information, including operations, planning, marketing interests, and products; (e) the terms of any agreement entered into between the Parties and the discussions, negotiations and proposals related thereto; and (f) information acquired during any facilities tours.*
- 3. The Party receiving Confidential Information (a "Recipient") will only have a duty to protect Confidential Information disclosed to it by the other Party ("Discloser"): (a) if it is clearly and conspicuously marked as "confidential" or with a similar designation; (b) if it is identified by the Discloser as confidential and/or proprietary before, during, or promptly after presentation or communication; or (c) if it is disclosed in a manner in which the Discloser reasonably communicated, or the Recipient should reasonably have understood under the circumstances including without limitation those described in Section 2 above, that the disclosure should be treated as confidential whether or not the specific designation "confidential" or any similar designation is used.*
- 4. A Recipient will use the Confidential Information only for the Purpose described above. A Recipient will use the same degree of care, but no less than a reasonable degree of care, as the Recipient uses with respect to its own information of a similar nature to protect the Confidential Information and to prevent: (a) any use of Confidential Information in violation of this agreement; and/or (b) communication of Confidential Information to any unauthorized third parties. Confidential Information may only be disseminated to employees, directors, agents or third party contractors of Recipient with a need to know and who have first signed an agreement with either of the Parties containing confidentiality provisions substantially similar to those set forth herein.*

6. *This Agreement imposes no obligation upon a Recipient with respect to Confidential Information that: (a) was known to the Recipient before receipt from the Discloser; (b) is or becomes publicly available through no fault of the Recipient; (c) is rightfully received by the Recipient from a third party without a duty of confidentiality; (d) is independently developed by the Recipient without a breach of this Agreement; (e) is disclosed by the Recipient with the Discloser's prior written approval; or (f) is required to be disclosed by operation of law, court order or other governmental demand ("Process"); provided that (i) the Recipient shall immediately notify the Discloser of such Process; and (ii) the Recipient shall not produce or disclose Confidential Information in response to the Process unless the Discloser has: (a) requested protection from the legal or governmental authority requiring the Process and such request has been denied, (b) consented in writing to the production or disclosure of the Confidential Information in response to the Process, or (c) taken no action to protect its interest in the Confidential Information within 14 business days after receipt of notice from the Recipient of its obligation to produce or disclose confidential information in response to the Process*

11. *No Party acquires any intellectual property rights under II Agreement (including, but not limited to, patent, copyright, and trademark rights) except the limited rights necessary to carry out the Purpose as forth in this Agreement.*

0. *Each Party acknowledges that damages for improper disclosure Confidential Information may be irreparable; therefore, the injured Party is entitled to seek equitable relief, including injunction and preliminary injunction, in addition to all other remedies available to it.*

18. The standard agreement entered into between the assessee and the advertisers is as under:-

Google Advertising Agreement

Customer

Advertising third party

Advertiser

Advertising third party

Invoicing address

Name and address

Customer will promptly notify Google of any change in address and contact name information for billing purpose.

Agreement name.

Agreement type

Agreement Id

*Purchase order #
Target start date
End date
Agreement budget
Service tax
Billing Method
Payment Terms (payment due within the following number of
days from invoice date)*

When applicable, Customer's purchase order number references above is required and must be provided by customer for Google Invoicing

This Adwords Agreement ('SA') shall be governed by terms and conditions ('Terms and Conditions') available at the following URL: <http://www.google.co.in/ladsladwordsterms.html>

All terms contained in the Terms and Conditions are made a part of this SA through incorporation by reference. The signatory of this Service Agreement represents that she has read and agrees to such Terms and Conditions and the terms of SA. There shall be no force or effect to any different or additional terms of any related SA, purchase order or sales document.

Google may decide at any time, in its sole discretion, to change, suspend or discontinue all or any aspect of its advertising programs, including their availability, and shall notify Customer of material changes and discontinuauons. Google shall have no liability for such decision.

By signing below, Customer represents and warrants that all client information, including but not limited to credit card information and invoicing information, provided herein is complete and accurate and that no additional information is necessary for payment of Google invoices.

Customer's campaign(s) may go live upon posting. at which time Google shall send Customer an email notifying customer it has 72 hours to modify Customers campaign keywords and settings as posted. During those 72 hours, Google is only liable to Customer for keywords or settings discrepancies if Customer can certify to Google by its contemporaneous documental (evidence that Google posted keywords or settings other than those requested by Customer.

The account (as modified by Customer, or if unmodified, as initially posted) will be deemed approved by Customer 72 hours after it initially posts.

Terms of Payment. If Google, at any time, deems itself insecure with respect to Customer's ability to meet its financial obligations under this SA, Google shall have the right to require pre-payment of the total amount due for the SA in advance of the Target Start Date or as otherwise requested by Google. Customer must remit all payments under this SA to Google by the due date

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indicated on the Invoice(s). In the event of nonpayment, Google reserves the right to immediately terminate this SA upon written notice to Customer and immediately suspend the entire Customer account. Late payments are subject to interest payments as set forth in the Terms and Conditions.

Methods of Billing:

Monthly Invoicing: Customer will be billed at the end of the month, based on the actual number of clicks or other billing methods Customer may choose to participate in as described in the FAQ (e.g. cost per impression programs). Customer's credit must first be approved by Google in order for this billing method to apply.

Prepayment: Customer will pay the total agreement budget prior to any campaign launch. Acceptance and terms of prepayment are at Google's sole discretion. Prepayment does not obligate Google to deliver any Ad Words ads notwithstanding acceptance of prepayment by Google. Unused portions of prepayments will be returned to Customer after the end date to the extent that there are no amounts still due to Google.

Right To Reject Advertisement: All advertisements submitted by Customer are subject to Google's approval. Google reserves the right to review, reject or remove any SA, advertisement, or URL link, except that Google will not cancel placement of an SA, advertisement, or URL link due to inventory demand for other advertisers. Customer pre-authorises Google to modify or rearrange the text elements in advertising creative submitted by Customer.

Please carefully read these Google Advertising Agreement terms and conditions ("Agreement") before selecting 'I Accept' and submitting your selection. By selecting 'I Accept', you agree to be legally bound by the terms of this agreement. If you do not agree to the terms of this agreement please select "I Decline" and submit your selection.

Customer signature

Name

Title

Company

Google Signature

Name

Title

Company.”

19. The Standard Google India Private Limited Advertising Program Terms are as under:

“Google India Private Limited Advertising Program Terms

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These Google India Private Limited Advertising Program Terms ("Terms") are entered into by, as applicable, the customer signing these Terms or any document that references these Terms or that accepts these Terms electronically ("Customer") and Google India Private Limited ("Google"). These Terms govern Google's advertising program(s) ("Program") as further described in the applicable Program's frequently asked questions at www.google.com (the "FAQs") and, as applicable, Customer's participation in any such Program (s), Customer's online management of any advertising campaigns ("Online Management") and/or any insertion orders ("IO" executed by and between the parties (together the "Agreement")). Google and Customer hereby agree and acknowledge:

1. Policies. Program use is subject to all applicable Google and Partner ad specification requirements and policies, including without limitation the Editorial Guidelines (adwords google.com/select/guidelines.html) Google Privacy Policy (www.google.com/privacy.html) and Trademark Guidelines (www.google.com/permissions/guidelines.html), (collectively, "Policies"). Policies may be modified any time. Customer shall direct only to Google communications regarding Customer ads on Partner Properties. Some Program features are identified as "Beta," "Ad Experiment," or otherwise unsupported ("Beta Features"). To the fullest extent permitted by law, Beta Features are provided "as is" and at Customer's option and risk. Customer shall not disclose to any third party any information from Beta Features, existence of non-public Beta Features or access to Beta Features. Google may, at its sole discretion and without any prior consent from the Customer, modify ads to comply with any Policies.

2. The Program: Customer is solely responsible for all: (a) ad targeting options and keywords (collectively "Targets") and all ad content, ad information, and ad URLs ("Creative"), whether generated by or for Customer; and (b) web sites, services and landing pages which Creative links or directs viewers to, and advertised services and products (collectively "Services"). Customer shall protect any Customer passwords and takes full responsibility for Customer's own, and third party, use of any Customer accounts. Ads may be placed on (y) any content or property provided by Google ("Google Property"), and unless opted-out by Customer (z) any other content or property provided by a third party ("Partner") upon which Google places ads ("Partner Property"). With respect to Adwords online auction-based advertising, Google may send Customer an email notifying Customer it has 72 hours ("Modification Period") to modify keywords and settings as posted. The account (as modified by Customer otherwise as initially posted) is deemed approved by Customer after the Modification Period, and Google is only liable to Customer for

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discrepancies if Customer can certify by contemporaneous documentary evidence that Google posted ads not approved by Customer. With respect to all other advertising, Customer must provide Google with all relevant Creative by the due date set forth in that advertising Program's applicable FAQ or as otherwise communicated by Google. Customer grants Google permission to utilize an automated software program to retrieve and analyze websites associated with the Services for ad quality and serving purposes, unless Customer specifically opts out of the evaluation in a manner specified by Google. Google or Partners may reject or remove any ad or Target any time for any or no reason. Google may modify the Program or these Terms at any time without liability and your use of the Program after notice that Terms have changed indicates acceptance of the Terms.

3. Cancellation. Customer may independently cancel advertising itself online through Customer's account, if any, or, if such online cancellation functionality is not available, with prior written notice to Google, including electronic mail. AdWords online auction-based advertising cancelled online will cease serving upon cancellation. All other advertising may be subject to Google's ability to re-schedule reserved inventory or cancel advertisements already in production. Cancelled advertisements may be published despite cancellation if cancellation of those ads occurs after any applicable commitment date as set forth in advance by the Partner or Google in which case Customer must pay for those ads. Google may cancel immediately any 10, any of its advertising Programs, or these Terms at any time with notice, in which case Customer will be responsible for any ads already run. Google may modify any of its advertising Programs at any time without liability. Sections 1, 2, 3,5, 6, 7, 8, and 9 will survive any expiration or termination of this Agreement.

4. Prohibited Uses; License Grant; Representations and Warranties. Customer shall not, and shall not authorize any party to: (a) generate automated, fraudulent or otherwise invalid impressions, inquiries, conversions, clicks or other actions; (b) use any automated means or form of scraping or data extraction to access, query or otherwise collect Google advertising related information from any Adwords website or property except as expressly permitted by Google; or (c) advertise anything illegal or engage in any illegal or fraudulent business practice. Customer represents and warrants that it holds and hereby grants Google and Partners all rights (including without limitation any copyright, trademark, patent, publicity or other rights) in Creative. Services and Targets needed for Google and Partner to operate Google's advertising programs for Customer (including without limitation any rights needed to host, cache, route, transmit, store, copy, modify, distribute, perform, display, reformat, excerpt, analyze, and

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create algorithms from and derivative works of Creative or Targets) in connection with this Agreement ("Use"). Customer represents and warrants that LV) all Customer information is complete, correct and current; and (z) any Use hereunder and Customer's Creative, Targets, and Customer's Services will not violate or encourage violation of any applicable laws, regulations, code of conduct, or third party rights (including, without limitation, intellectual property rights). Violation of the foregoing may result in immediate termination of this Agreement or customer's account without notice and may subject Customer to legal penalties and consequences.

3. Disclaimer and Limitation of Liability. To the fullest extent permitted by law. GOOGLE DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION FOR NONINFRINGEMENT, SATISFACTORY QUALITY, MERCHANTABILITY AND FITNESS FOR ANY PURPOSE. To the fullest extent permitted by law, Google disclaims all guarantees regarding positioning or the levels or timing of (i) costs per click, (ii) click through rates, (iii) availability and delivery of any impressions, Creative, or Targets on any Partner Property, Google Property, or section thereof, (iv) clicks (v) conversions or other results for any ads or Targets (vi) the accuracy of Partner data (e.g. reach, size of audience, demographics or other purported characteristics of audience), and (vii) the adjacency or placement of advertisements within a Program. EXCEPT FOR indemnification AMOUNTS PAYABLE TO THIRD PARTIES HEREUNDER AND CUSTOMER'S BREACHES OF SECTION 1, to the fullest extent permitted by law: (a) NEITHER PARTY WILL BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, EXEMPLARY, OR PUNITIVE DAMAGES (INCLUDING WITHOUT LIMITATION LOSS OF PROFITS, REVENUE, INTEREST, GOODWILL, LOSS OR CORRUPTION OF DATA OR FOR ANY LOSS OR INTERRUPTION TO CUSTOMER'S BUSINESS) WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE) OR ANY OTHER LEGAL THEORY, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY; AND (b) EACH PARTY'S AGGREGATE LIABILITY TO THE OTHER IS LIMITED TO AMOUNTS PAID OR PAYABLE TO GOOGLE BY CUSTOMER FOR THE AD GIVING RISE TO THE CLAIM. Except for payment obligations, neither party is liable for failure or delay resulting from a condition beyond the reasonable control of the party, including but not limited to acts of God, government, terrorism, natural disaster, labor conditions and power failures.

6. Agency. Customer represents and warrants that (a) it is authorized to act on behalf of and has bound to this Agreement any third party for which Customer advertises (a "Principal") (b) as between

Principals and Customer, the Principal owns any rights to Program information in connection with those advertisements, and (c) Customer shall not disclose Principal's Program information to any other party without Principal's consent.

7. *Payment Customer shall be responsible for all charges up to the amount of each 10, or as set in an online account, and shall pay all charges in Indian Rupees or in such other currency as agreed to in writing by the parties. Unless agreed to by the parties in writing, Customer shall pay all charges in accordance with the applicable 10 or Program FAQ. Late payments bear interest at the rate of 1.5% per month (or the highest rate permitted by law, if less). Charges are exclusive of taxes, cesses or other applicable levies. Customer is responsible for paying (y) all applicable taxes, cesses and levies, government charges, and (z) reasonable expenses and attorneys fees Google incurs collecting late amounts. To the fullest extent permitted by law, Customer waives all claims relating to charges unless claimed within 60 days after the charge (this does not affect Customer's credit card issuer rights). Charges are solely based on Google's measurements for the applicable Program, unless otherwise agreed in writing. To the fullest extent permitted by law, refunds (if any) are at the discretion of Google and only in the form of advertising credit for only Google Properties. Nothing in these Terms or and 10 may obligate Google to extend credit to any party. Customer acknowledges and agrees that any credit card and related billing and payment information that Customer provides to Google may be shared by Google with companies who work on Google's behalf, such as payment processors and/or credit agencies, solely for the purposes of checking credit, effecting payment to Google and servicing Customer's account. Google may also provide information in response to valid legal process, such as subpoenas, search warrants and court orders, or to establish or exercise its legal rights or defend against legal claims. Google shall not be liable for any use or disclosure of such information by such third parties.*

8. *Indemnification. Customer shall indemnify without limit and defend Google, its Partners, agents, affiliates, and licensors from any third party claim or liability (collectively, "Liabilities"), arising out of Use, Customer's Program use, Targets, Creative and Services and breach of the Agreement. Partners shall be deemed third party beneficiaries of the above Partner indemnity. Without limitation to the generality of the foregoing, Customer shall indemnify Google against any Liabilities or losses arising out of any claim based on any act or allegation of infringement of intellectual property, misrepresentation or defamation.*

9. *Arbitration. The parties agree that they will try in good faith to settle within thirty (30) days any dispute, controversy or claim arising out*

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of relating to or in connection with this Agreement ("Dispute"). If the Dispute is not resolved within thirty (30) days after such Dispute arose, such Dispute must be referred to and finally resolved by arbitration, to which the Parties hereto expressly agree and submit. The arbitration will be submitted to the International Centre for Dispute Resolution of the American Arbitration Association ("AAA") and conducted in accordance with the Commercial Arbitration Rules of the AAA in force as of the date of this Agreement ("Rules"). Pre-hearing information exchange shall be limited to the reasonable production of relevant, non-privileged documents and carried out expeditiously. There will be one arbitrator selected by mutual agreement of the Parties. The arbitrator will not act as amiable compositeur or ex aequo et bono. It is the intent of the parties that, barring extraordinary circumstances, arbitration proceedings will be concluded within 60 days from the date the arbitrator is appointed. The arbitrator may extend this time limit in the interests of justice. Failure to adhere to this time limit shall not constitute a basis for challenging the award. The arbitration will be conducted in English and the place of arbitration will be Bangalore, India. Either party may, without waiving any remedy under this Agreement, apply to the arbitrator and/or any court having jurisdiction any interim, provisional, injunctive or conservatory relief that is necessary to protect the rights or property of that party until the arbitration award is rendered or the Dispute is otherwise resolved. Any decision rendered by the arbitrator will be final and binding on the parties, and judgment thereon may be entered by any court of competent jurisdiction, including, but not limited to, any court that has jurisdiction over either of the parties or any of their assets. The parties expressly agree that the arbitrator will be empowered to award and order equitable or injunctive relief with respect to matters brought before him, provided however, that such remedy or relief is consistent with the remedies and limitations set forth in this Agreement. The parties agree that all arbitral proceedings conducted pursuant to this Section, including the existence of any arbitral proceedings, information disclosed in the course of such arbitral proceedings, and any settlements, negotiations, discussions, proposals, and awards related thereto shall be considered confidential information and shall not be disclosed to third parties except as required by law or otherwise provided herein. The parties may, however, disclose such information to an appropriate court, as is necessary to seek enforcement of any award rendered by the arbitrator or to seek any interim, provisional, injunctive or conservatory relief pursuant to the terms hereof

10. Miscellaneous. The Agreement must be construed as if both parties jointly wrote it, governed by Indian law. The Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes and replaces any other applicable agreements, terms and conditions applicable to the subject matter hereof Any

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conflicting or additional terms contained in additional documents (e.g. reference to a purchase order number) or oral discussions are void. Each party shall not disclose the terms or conditions of these Terms to any third party, except to its professional advisors under a strict duty of confidentiality or as necessary to comply with a government law, rule or regulation. Customer may grant approvals, permissions, extensions and consents by email, but any modifications by Customer to the Agreement must be made in a writing executed by both parties. Any notices to Google must be sent to Google India Pvt. Ltd., No.3, RMZ Infinity - Tower E, Old Madras Road, 4th Floor, Bangalore, 560016, India with a copy to Legal Department, via confirmed facsimile, with a copy sent via first class or air mail or overnight courier, and are deemed given upon receipt. Notice to Customer may be effected by sending email to the email address specified in Customer's account, or by posting a message to Customer's account interface, and is deemed received when sent (for email) or no more than 15 days after having been posted (for messages in Customer's account interface). A waiver of any default is not a waiver of any subsequent default. Unenforceable provisions will be modified 10 reflect the parties' intention and only to the extent necessary to make them enforceable, and remaining provisions of the Agreement will remain in full effect. Customer may not assign any of its rights hereunder and any such attempt is void. Google and Customer and Google and Partners are not legal partners or agents, but are independent contractors. In the event that these Terms or an Advertising Program expire or is terminated, Google shall not be obligated to return any materials to Customer.

11. Term: Unless terminated earlier under the terms of this Agreement This Agreement shall have a term of 1 year from the latest of the signature dates below. Customer acknowledges and agrees that if this Agreement expires or is terminated any Customer campaigns in effect as of the date of such expiration or termination or any new campaigns commenced after such expiration or termination shall run thereafter subject to Google's then standard terms and conditions for the Program.”

20. Under the Distribution Agreement, the assessee acted as a distributor of online advertisement space to Indian Advertisers. The assessee was ensured a specified margin over its cost from GIL. If in case, the revenue recorded by the assessee from the sale of online advertisement space to Indian Advertisers was less than its cost (incurred in connection with its distribution function) plus the specified margin, GIL was required to compensate the assessee for the difference. However, where the revenue recorded by the assessee from the onward sale of online advertisement space to Indian Advertisers was more than the cost plus the

specified margin of the assessee, the assessee was required to make the payment to GIL.

21. *In the present case, it is not in dispute that the DT AA between India - Ireland is applicable in respect of the payments made by the assessee to Google Ireland. The Hon'ble Supreme Court in Engineering Analysis Centre of Excellence (P) Ltd v CIT (supra) at para 108 of its judgment held as under:-*

"108. Fourthly, the High Court is not correct in referring to section 9(1)(vi) of the Income-tax Act after considering it in the manner that it has and then applying it to interpret the provisions under the Convention between the Government of the Republic of India and the Government of Ireland for the Avoidance of Double Taxation and for the Prevention of Fiscal Evasion with respect to Taxes on Income And Capital Gains, "India-Ireland DTAA". Article 12 of the aforesaid treaty defining "royalties" would alone be relevant to determine taxability under the DTAA, as it is more beneficial to the assessee as compared to section 9(1)(vi) of the Income-tax Act, as construed by the High Court. Here again, section 90(2) of the Income-tax Act, read with explanation 4 thereof has not been properly appreciated."

22. *Thus, the definition of the term "royalty" in Article 12(3) of the India - Ireland DT AA override the definition of "royalty" as provided in Explanation 2 to section 9(1)(vi) of the Act by virtue of section 90(2). Therefore, the definition of the term "royalty" under the India - Ireland DTAA being more beneficial to the assessee must only be considered in these appeals. The findings of the AO and CIT(A) as regards the characterisation of the payments to Google Ireland as 'Royalty' under section 9(1)(vi) of the Act is therefore not relevant and consequently correctness of these findings need not be adjudicated in these appeals. Similarly, we do not think it is necessary to decide whether the services agreement and distribution agreement are interlinked or complementary to each other. ITES services are enabling the overall business and not directly related to generating revenue from Adword Program in India. Revenue is generated by end customers clicking on link and not because of ITES services. Even if it is interlinked, the internal tools / intangibles / software of Google Ireland are admittedly not transferred to assessee. The assessee has only right to use these for rendering ITES services. Applying ratio of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited (supra), this cannot result in royalty. We proceed to examine whether the definition of 'Royalty' as per Article 12 of India-Ireland DT AA is satisfied in the present case considering the distribution agreement, services agreement and the facts on record.*

23. *The definition of 'Royalty' as per Article 12(3)(a) of India - Ireland DTAA is as under:-*

"3. (a) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph film or films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process or for the use of or the right to use industrial, commercial or scientific equipment, other than an aircraft or for information concerning industrial, commercial or scientific experience.
"

24. *The first limb of the above definition treats consideration for the use of or the right to use any copyright of literary, artistic or scientific work including cinematograph film or films or tapes for radio or television broadcasting as royalty. The computerised advertising program i.e., "Google AdWords Program" is essentially a computer program i.e., a computer software. As per Explanation 3 to section 9(1)(vi), a computer software means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data. It is not in dispute that the Adwords Program is used by the assessee in the present case be it for the purpose of discharging its functions under the distribution agreement or under the services agreement. However, the question for our consideration is whether the copyright in "Google AdWords Program" is used by the assessee or not? In order to attract definition of 'Royalty', there has to be use or right to use, inter alia, any copyright. The issue as to whether usage of computer software tantamounts to royalty, is now resolved by the Supreme Court decision in the case of Engineering Analysis Centre of Excellence Private Limited (supra). The Supreme Court grouped the various appeals on the aspect of royalty issue on software payments into four categories as under:-*

Category 1: Computer software purchased by an end-user, resident in India, from a foreign non-resident supplier/manufacturer.

Category 2: Purchase of computer software by resident Indian companies that act as distributors/resellers, from foreign non-resident suppliers for the purpose reselling the same to resident Indian users.

Category 3: Purchase of software by foreign non-resident distributor from a foreign non-resident supplier for the purpose of reselling the same to Indian distributors or end-users.

Category 4: Computer software affixed onto a hardware and sold as an integrated unit/equipment by foreign non-resident suppliers to Indian distributors or end-users.

25. *The Supreme Court made a reference to the relevant provisions of the Copyright Act and on the interpretation of the same, it accepted the difference*

between a copyright right and copyrighted article. The important observations of the Supreme Court are summarized as follows:-

“71. The transfer of "all or any rights (including the granting of a licence) in respect of any copyright", in the context of computer software, is referable to sections 14(a), 14(b) and 30 of the Copyright Act. As has been held hereinabove, the expression "in respect of" is equivalent to "in" or "attributable to". Thus, explanation 2(v) to section 9(1)(vi) of the Income Tax Act, when it speaks of "all of any rights ... in respect of copyright" is certainly more expansive than the DTAA provision, which speaks of the "use of, or the right to use" any copyright.

72. However, when it comes to the expression "use of, or the right to use", the same position would obtain under explanation 2(v) of section 9(1)(vi) of the Income-tax Act, inasmuch as, there must, under the licence granted or sale made, be a transfer of any of the rights contained in sections 14(a) or 14(b) of the Copyright Act, for explanation 2(v) to apply. To this extent, there will be no difference in the position between the definition of "royalties" in the DTAA and the definition of "royalty" in Explanation 2(v) of section 9(1)(vi) of the Income-tax Act.

73. Even if we were to consider the ambit of "royalty" only under the Income-tax Act on the footing that none of the DTAA apply to the facts of these cases, the definition of royalty that is contained in explanation 2 to section 9(1)(vi) of the Income-tax Act would make it clear that there has to be a transfer of "all or any rights" which includes the grant of a licence in respect of any copyright in a literary work. The expression "including the granting of a licence" in clause (v) of explanation 2 to section 9(1)(vi) of the Income-tax Act, would necessarily mean a licence in which transfer is made of an interest in rights "in respect of" copyright, namely, that there is a parting with an interest in any of the rights mentioned in section 14(b) read with section 14(a) of the Copyright Act. To this extent, there will be no difference between the position under the DTAA and Explanation 2 to section 9(1)(vi) of the Income-tax Act.

.....97. When, under a non-exclusive licence, an end-user gets the right to use computer software in the form of a CD, the end-user only receives a right to use the software and nothing more. The end-user does not get any of the rights that the owner continues to retain under section 14(b) of the Copyright Act read with

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sub-section (a)(i)-(vii) thereof Thus, the conclusion that when computer software is licensed for use under an EULA, what is also licensed is the right to use the copyright embedded therein, is wholly incorrect. The licence for the use of a product under an EULA cannot be construed as the licence spoken of in section 30 of the Copyright Act, as such EULA only imposes restrictive conditions upon the end-user and does not part with any interest relatable to any rights mentioned in sections 14(a) and 14(b) of the Copyright Act.

100. Also, any ruling on the more expansive language contained in the explanations to section 9(1)(vi) of the Income- tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income-tax Act read with explanation 4 thereof and Article 3(2) of the DTAA. Further, the expression "copyright" has to be understood in the context of the statute which deals with it, it being accepted that municipal laws which apply in the Contracting States must be applied unless there is any repugnancy to the terms of the DTAA. For all these reasons, the determination of the AAR in Citrix Systems Asia Pacific Pty. Ltd (supra) does not state the law correctly and is thus set aside.

108. Fourthly, the High Court is not correct in referring to section 9(1)(vi) of the Income-tax Act after considering it in the manner that it has and then applying it to interpret the provisions under the Convention between the Government of the Republic of India and the Government of Ireland for the Avoidance of Double Taxation and for the Prevention of Fiscal Evasion with respect to Taxes on Income And Capital Gains. ["India-Ireland DTAA"]. Article 12 of the aforesaid treaty defining "royalties" would alone be relevant to determine taxability under the DTAA, as it is more beneficial to the assessee as compared to section 9(1)(vi) of the Income-tax Act, as construed by the High Court. Here again, section 90(2) of the Income-tax Act, read with explanation 4 thereof has not been properly appreciated

117. The conclusions that can be derived on a reading of the aforesaid judgments are as follows:

- (i) Copyright is an exclusive right, which is negative in nature, being a right to restrict others from doing certain acts.*
- (ii) Copyright is an intangible, incorporeal right, in the nature of a privilege, which is quite independent of any material substance.*

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Ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied. An obvious example is the purchaser of a book or a CD/DVD, who becomes the owner of the physical article, but does not become the owner of the copyright inherent in the work, such copyright remaining exclusively with the owner.

(i) Parting with copyright entails parting with the right to do any of the acts mentioned in section 14 of the Copyright Act. The transfer of the material substance does not, of itself, serve to transfer the copyright therein. The transfer of the ownership of the physical substance, in which copyright subsists, gives the purchaser the right to do with it whatever he pleases, except the right to reproduce the same and issue it to the public, unless such copies are already in circulation, and the other acts mentioned in section 14 of the Copyright Act.

(iv) A licence from a copyright owner, conferring no proprietary interest on the licensee, does not entail parting with any copyright, and is different from a licence issued under section 30 of the Copyright Act, which is a licence which grants the licensee an interest in the rights mentioned in section 14(a) and 14(b) of the Copyright Act. Where the core of a transaction is to authorize the end-user to have access to and make use of the "licensed" computer software product over which the licensee has no exclusive rights, no copyright is parted with and consequently, no infringement takes place, as is recognized by section 52(l)(aa) of the Copyright Act. It makes no difference whether the end-user is enabled to use computer software that is customised to its specifications or otherwise.

(iii) A non-exclusive, non-transferable licence, merely enabling the use of a copyright product, is in the nature of restrictive conditions which are ancillary to such use, and cannot be construed as a licence to enjoy all or any of the enumerated rights mentioned in section 14 of the Copyright Act. or create any interest in any such rights so as to attract section 30 of the Copyright Act.

(v) The right to reproduce and the right to use computer software are distinct and separate rights, as has been recognized in State Bank of India (supra) (see paragraph 21), former amounting to parting with copyright and the latter, in the context of no exclusive EULAs, not being so."

26. Having considered the above principles in the context of copyright royalty, we proceed to examine the applicability of the above principles to the facts of the

present case particularly with reference to distribution agreement, services agreement and other facts on record. As per para 2.1 of the distribution agreement, assessee is appointed as a non exclusive authorised distributor of Google Adwords program to Advertisers. Para 2.2 of the agreement states that the distributor agrees to market and distribute Adwords program to advertisers within the broad guidelines provided by Google with its reasonable commercial expertise and own sales force and customer service infrastructure. It also provides that the Distributor will distribute the AdWords program in accordance with the training provided by Google. As per para 2.3, distributor shall be responsible for uploading all Advertiser information that is required by Google for participation in the Adwords Program. As per para 2.6, distributor will provide after sales services to Advertisers in accordance with the broad instructions, training and standards of Google. The advertising space is provided by GIL through the Adwords program and GIL also agreed to train the distributor. It is specifically agreed that the agreement shall constitute a non exclusive relationship between Google Ireland and distributor. Google Ireland owns all right, title and interest in and to all information and data including the user data collected by it in connection with the provision of the Adwords Program.

27. As per the service level agreement - Exhibit C to distribution agreement, assessee distributor shall be solely responsible for providing all customer services to Advertisers, according to the procedures, and in compliance with standards, provided by Google. All Advertisers shall be instructed by Distributor to contact Distributor directly for support, and not to communicate directly with Google Ireland. Distributor agrees that it shall provide minimum levels of service like Business hours phone support to all Advertisers, E-mail queries from Advertisers shall be responded to within one (1) business day with immediate resolution of any issues when possible. It was decided that the issues that cannot immediately be resolved by Distributor based on training and procedures provided under the Agreement must be communicated promptly to Google Ireland by Distributor / assessee, and Google Ireland will assist assessee / Distributor in determining the best solution. It was also agreed that the distributor agrees that Google Ireland will have the right, to review samples of communications sent to Advertisers to assess the quality of responses and modify communications accordingly. Google Ireland shall also have the right to send questionnaires to Distributor's customers to ensure that Distributor is providing an adequate level of service.

28. As per the standard Advertising program terms, the advertiser is solely responsible for all ad targeting options, keywords and all ad content. The advertiser represents and warrants that it holds and hereby grants Google and Partners all rights (including without limitation any copyright, trademark, patent, publicity or other rights) in Creative, Services and Targets needed for Google and Partner to operate Google's advertising programs for Customer (including without limitation any rights needed to host, cache, route, transmit, store, copy, modify, distribute, perform, display, reformat, excerpt, analyze, and create algorithms from and

derivative works of Creative or Targets) in connection with this Agreement ("Use"). The advertiser represents and warrants that (y) all Customer information is complete, correct and current; and (z) any Use hereunder and Customer's Creative, Targets, and Customer's Services will not violate or encourage violation of any applicable laws, regulations, code of conduct, or third party rights (including, without limitation, intellectual property rights). Violation of the foregoing may result in immediate termination of this Agreement or customer's account without notice and may subject Customer to legal penalties and consequences.

29. As per the services agreement, the assessee was providing information and information technology enabled services to Google Ireland. As regards ownership of intellectual property and ownership of derivate works, it was agreed that all intellectual property shall remain the exclusive property of Google Ireland. The confidential information provided by Google Ireland was to be employed by the assessee in performance of its services under the agreement and it shall remain the sole property of the Google Ireland. The statements recorded from the employees also confirms that the confidential information, software technology and the training documents for providing services under the services agreement are provided by Google Ireland to the assessee.

30. On a consideration of all the above agreements and the facts on record, we find that none of the rights as per section 14(a)/(b) and section 30 of the Copyright Act, 1957 have been transferred by Google Ireland to the assessee in the present case. As held by the Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence Private Limited v. CIT & Anr. (supra), mere use of or right to use a computer program without any transfer of underlying copyright in it as per section 14(a)/(b) or section 30 of the Copyright Act, 1957 will not be satisfying the definition of Royalty under the Act / DTAA. Similarly, use of confidential information, software technology, training documents and others are all 'literary work' with copyrights in it owned by the foreign entity and there was no transfer or license of copyrights in favour of the assessee company. Hence, the impugned payments cannot be characterised as 'Royalty' under the DTAA.

31. The lower authorities have held that the assessee has been granted the use of or right to use trademarks, other brand features and the process owned by Google Ireland for the purpose of distribution of Adwords program and consequently the sums payable to Google Ireland are royalty. As per Article 12 of India - Ireland DTAA, consideration for the use of or right to use any patent, trade mark, design or model, plan, secret formula or process is regarded as royalty. In the present case, as per the distribution agreement, "Google Brand Features" means the Google trade names, trademarks, service marks, logos, domain names, and other distinctive brand features, with some but not all examples at "<http://www.google.com/permissions/trademarks.html>" (or such other URL that Google may provide from time to time), and such other trade names, trademarks, service marks, logos, domain names, or other distinctive brand features that

Google may provide to Distributor for use solely under this Agreement. As per para 6 of the distribution agreement, each party shall own all right, title and interest, including without limitation all Intellectual Property Rights, relating to its Brand Features and Google Ireland grants to the assessee / distributor nonexclusive and nonsublicensable licence during the Term to display Google Brand Features solely for the purpose of distributor's marketing and distribution of AdWords Program under the terms and subject to the conditions set forth in this Agreement. It is thus evident that the trademark and other brand features are not used independently or de hors the distribution agreement but they are incidental or ancillary for the purpose of carrying out the marketing and distribution of Adword program. The Delhi High Court in DIT v Sheraton International Inc [2009] 313 ITR 267 held that when the use of trade mark, trade name etc are incidental to the main service of advertisement, publicity and sales promotion and further when there is no consideration payable for such use of trade mark, trade name etc, the consideration cannot be characterised as royalty. Applying the said principle, in the present case, use of Google Brand Features etc are de hors any consideration payable to Google Ireland and further they are incidental and ancillary for achieving the main purpose of marketing and distributing the Google Adwords Program. Hence, the lower authorities were not right in treating the payments as Royalty.

32. As regards the applicability of 'use of or right to use industrial, commercial or scientific equipment" the CIT(A) held that the assessee cannot be said to have gained right to use any scientific equipment, since, Google Ireland has not parted with the copyright it holds in the Adwords program and hence it cannot be said that any kind of technical knowhow has been transferred to the assessee company. The CIT(A) was not in agreement with the AO on the above issue without prejudice to his view in holding that the remitted amount is royalty on different grounds. The revenue has not challenged the said finding of CIT(A). Hence, the impugned payments cannot be regarded as made for 'use of or right to use industrial, commercial or scientific equipment'. The remaining portion of definition of 'Royalty' under the India - Ireland DT AA is consideration for information concerning industrial, commercial or scientific experience. The AO has not characterised the impugned payments as a consideration for the above. In any case, CIT(A) has given a finding that it cannot be said that any kind of technical knowhow has been transferred to the assessee company. This has not been challenged by the revenue.

33. Thus on an overall analysis of the entire facts on record, we hold that the impugned payments cannot be regarded as royalty under the India - Ireland DTAA. It is true that the Google Adword program was commercially and profitably exploited in a commercial sense and profitable manner in India to generate revenues from Indian customers or advertisers. This is the business or commercial aspect of the transaction. However, the stand of the lower authorities that the impugned payments are in the nature of Royalty cannot be upheld especially under Article 12 of the India - Ireland DTAA merely because the marketing,

distribution and ITES activities are carried out in India and revenues are generated from India or from Indian Advertisers. As held by the Supreme Court in the case of UOI v Azadi Bachao Andolan [2003] 263 ITR 706, at page 763:

"We are unable to agree with the submissions that an act which is otherwise valid in law can be treated as non est merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interests, as perceived by the respondents."

34. Before concluding, it is to be mentioned that the taxability with respect to payments made for purchase of online advertisement has been decided by the following Coordinate Bench orders of the I.T.Act:-

(i) **Yahoo (supra):** Department of Tourism of India hired the services of Yahoo India for uploading, displaying, and hosting its banner advertisement on the Yahoo portal, which was operated by Yahoo Hong Kong. For the said purposes Yahoo India engaged Yahoo Hong Kong for uploading and displaying the said banner advertisement. Pursuant to such arrangement, Yahoo India received consideration from Department of Tourism of India and after retaining its margin, the balance was remitted to Yahoo Hong Kong. The payment remitted by Yahoo India to Yahoo Hong Kong was the subject matter of dispute before the Tribunal. The AO as well as CIT(A) held such payments to be royalty and in that manner, disallowed the expenditure in the hands of Yahoo India under section 40(a) of the Act. The Tribunal, in second appeal, held that banner advertisement hosting services did not involve use or right to use any industrial, commercial, or scientific equipment and no such use was granted by Yahoo Hong Kong. In that manner, the Tribunal set aside the findings of the AO and CIT(A), wherein the subject payments were characterised as royalty.

(ii) **Pinstorm (supra):** Pinstorm was engaged in buying online advertisement space for onward re-sale to an advertiser, much like GIPL in the present case. For such purpose, Pinstorm made payments to GIL, which were disallowed by the AO and CIT(A) under section 40(a)(i) of the Act, on the premise that the said payments were taxable in India. While the AO held the said payments to be fees for technical services ("FTS"), the CIT(A) held them to be royalty. The Tribunal relied on the decision in Yahoo (supra) to delete the disallowance. It was also observed by the Tribunal that the said payments were business profits, which were not taxable in India, since GIL did not have a PE in India.

(iii) Right Florists (supra): Right Florist was a florist who used Google Search Engine for online advertising, to generate more business for itself. In this case again, the AO had disallowed the payments made by Right Florist for online advertising under section 40(a)(i) of the Act. However, the CIT(A) reversed the said decision on the ground that none of the recipients of the payments had a PE in India. The Tribunal, in Department's appeal, upheld the order of the CIT(A), while observing that the decisions in Yahoo (supra) and Pinstorm (supra) were authorities in support of the proposition that payment by the Indian arm of a foreign owner of search engine portal, in connection with online advertising, is not in the nature of royalty as per section 9(1)(vi) of the Act. In this decision, the Tribunal also discussed the modalities involved in the online advertising business, in the context of Google Search Engine.

(iv) Inception Business (supra): In this case the assessee was engaged in the business of brand management as well as posting advertisements in the social portal on behalf of their clients. The AO held the payments made by it for that purpose to Facebook Ireland Ltd., a non-resident, to be taxable in India. The CIT(A) upheld the order of the AO. The Tribunal relied on the decision in Yahoo (supra), Pinstorm (supra), Right Florists (supra), while setting aside the order of the AO/ CIT(A) and holding that the payments for purchase of online advertisement space were not taxable in India.

(v) Urban Ladder (supra): The assessee in this case, made payments to Facebook Ireland Ltd., for online advertising. The AO held the said payments to be royalty. The CIT(A) upheld the order of the AO. However, while doing so, the CIT(A) relied upon certain functional aspects of advertisement system qua Patent Number US20040059708A1 as well as US7778872B2. These two patents are held by Google LLC., USA in connection with the Google AdWords Program hereto. The Tribunal, set aside the order of the CIT(A), while following the decision of the Hon'ble Supreme Court in Engineering Analysis (supra). The Hon'ble Tribunal also relied on the decisions in Yahoo (supra), Pinstorm (supra) and Right Florists (supra).

(vi) Myntra Designs (supra): Myntra in this case, made payments to Facebook Ireland Ltd., for online advertising. The AO held the said payments to be royalty and in the alternate, as FTS. The CIT(A) upheld the order of the AO. The Tribunal followed the decision in Urban Ladder (supra), while setting aside the order of the CIT(A).

(vii) Play Games (supra): Play games is engaged in the business of providing a platform for online gaming. It had made payments to

Facebook Ireland Ltd. for online advertising. The AO and CIT(A) in this case as well, held that payments to be taxable in India. The Hon'ble Tribunal observed that Play Games did not get any right to modify/ deal with the servers, which belonged to Facebook Ireland Ltd., in any manner. It was also observed inter alia that the said servers, which hosted online advertisements, were located outside India and that Facebook Ireland Ltd. did not have a PE in India. In that manner, the Tribunal set aside the order of the CIT(A) and held the payments in question to be neither royalty, nor FTS.

(viii) Matrimony.com (supra): Matrimony.com in this case, made payments to Facebook Ireland Ltd. for online advertising. The AO in this case as well, disallowed the said payments under section 40(a)(i) of the Act, which action was upheld by the CIT(A). The Tribunal followed the decision in *Urban Ladder (supra)*, while deleting the said disallowance.

(ix) *ESPN Digital Media (supra):* *ESPN India in this case, entered into a re-seller agreement with ESPN UK, for the resale of online advertisement space. In terms thereof, ESPN India purchased online advertisement space for re-sale to Indian advertisers. For this purchase, it made payments to ESPN UK, which were characterised as royalty by the AO. The CIT(A) upheld the order of the AO. The Tribunal, in second appeal, set aside the order of the CIT(A), while observing that ESPN India was merely making payment under the re-seller agreement towards purchase of online advertisement space. It was also observed that a website is not a tangible property and is certainly not a high-tech equipment. It was also observed that the reliance of the AO and CIT(A) on the decision in Verizon Communications Singapore Pte Ltd. v. ITO, (2014) 361 ITR 575 (Madras High Court) was misplaced, since the same had been overruled by the Hon'ble Supreme Court in the decision in Engineering Analysis (supra).*

(x) *Interactive Avenues (supra):* *Interactive Avenues is an internet advertising agency, which places online advertisements on behalf of its clients. The payments in this case were made to Facebook Ireland Ltd., which were disallowed by the AO and the CIT(A). The Tribunal observed that Interactive Avenues was utilising Google Search Engine amongst others, to buy online advertisement space on behalf of its clients. Be that as it may, the Tribunal set aside the order of the CIT(A) and held that the payments in question could not be characterised as royalty, while relying on the decisions in *Urban Ladder (supra)* and *Play Games (supra)*.*

35. *It is also relevant to point out that in the context of interpreting Article 12(3) of India – Ireland DTAA, it is relevant to take note of the existing international jurisprudence. The Technical Advisory Group (“TAG”) set up by the Organisation for Economic Co-operation and Development (“OECD”), in its Report (2001) on treaty characterisation of electronic commerce payments analysed various e-commerce transactions and suggested suitable characterisation for consideration flowing thereunder. One of the transactions analysed by TAG was advertising. In the context of online advertisements, including advertisements where the payment is based on number of clicks (i.e., CPC basis), TAG recommended taxability of such payments under Article 7 of the relevant DTAA. The said Article 7 deals with “business profits” and not royalty. Business profits under Article 7 are taxable only where the non-resident has a PE in India.*

36. *It is important to note that TAG was set up by OECD and its recommendation on changes to the OECD commentary were accepted by OECD. As per the recent decision of the Hon’ble Supreme Court in Engineering Analysis, (supra), OECD commentary is a necessary aid for the interpretation of provisions contained in DTAA. In fact, the High-Powered Committee (“HPC”) on electronic commerce and taxation, set up by the Central Board of Direct Taxes (“CBDT”) had also accepted the view taken by TAG and recommended taxing consideration flowing for online advertisement under Article 7, and not Article 12 of the relevant DTAA.*

37. *Therefore, in terms of the international guidance as stated herein, the position regarding taxability of receipts from sale of online advertisement space is clear. Unless the non-resident, who is engaged in sale of online advertisement space, has a PE in India, no portion of receipts earned by it from sale of online advertisement space in India can be brought to tax in India as Act read with the relevant DTAA.*

38. *The above view is also supported by insertion of provisions related to Equalisation Levy (EL) by Finance Act, 2016. The root for the emergence of the EL can be traced to the dynamic business models that have the ability to transcend the link between an income producing activity and a specific location since these business are carried in the cyber place. The PE definition presently is based upon the physical presence criteria. The new business models also created challenges in characterizing the nature of payment – whether the payment is for services or for any IPR and hence royalty or whether it represents pure business profits. Various ITAT decisions, as discussed above, have held that income from sale of advertisement space on a website is not taxable in India if there is no PE of the foreign enterprise in India. It was held that such income is not to be regarded as royalty or FTS. Such tax challenges is addressed by the introduction of EL. Section 165 of the Finance Act, 2016 provides for charge of EL at 6% on consideration for specified services. Section 164(i) of Finance Act, 2016 provides that “specified service” means online advertisement, any*

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provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government in this behalf. Thus, online advertisement is now covered under EL. If online advertisement was already covered under definition of royalty, then bringing it as part of EL scheme would not arise.

39. In view of the aforesaid discussion and the judicial pronouncements, cited supra, we hold that the impugned payment cannot be characterized as royalty under the India-Ireland DTAA. It is ordered accordingly.

40. In the result, the appeals filed by the assessee are allowed.”

8.1. Respectfully following the above order of the Tribunal, we inclined to decide the assessee's appeal in IT(IT)A No.1190/Bang/2014 in favour of the assessee.

8.2. Since it was decided on payment made by GIPL to M/s. Google Ireland Ltd. for purchase of online advertisement phase for onward resale to India advertisers, in terms of distribution agreement dated 12.12.2005, were not in nature of royalty as defined u/s 9(1)(vi) of the Act read with Article 12(3)(a) of TTA between India and Ireland and observed that GIPL was not an assessee in default u/s 201 of the Act, for not deducting the tax at source, on the payment in question, under the section 195 of the Act and the issue of beneficial ownership which is consequential in nature and as such this issue became academic and the appeal of the revenue is not surviving. Accordingly, the appeal of the revenue is dismissed as infructuous.

9. Coming to IT(IT)A No.949 & 950/Bang/2017 & IT(IT)A No.978/Bang/2019, the issue is similar to that one considered in IT(IT)A No.1190/Bang/2014 above and applying the same ratio a discussed in earlier order of the Tribunal in IT(IT)A No.1513 to

1516/Bang/2013 dated 19.10.2022, the assessee's appeals are allowed.

10. Further, the assessee has raised ground in ground No.8 in IT(IT)A No.949 & 950/Bang/2017 as below:

“Beneficial ownership of payments under the DTAA

8 Not adhering to the rule of consistency by not following the ld CIT(A)'s decision for AY 2013-14 in the appellant's very own case and taking contradictory views without considering:

- certificates issued by the Irish Revenue Authorities stating that GIL is a tax resident of Ireland and it's world-wide income is taxed Ireland.*
- fact that there was neither any change in facts of the appellant vis-à-vis the previous year nor was any new material fact brought on record by the ld AO*
- not providing an opportunity of being heard to the appellant and thereby violating principles of natural justice*
- rule of consistency requires that when contradictory views are taken vis-à-vis the previous years, reasons for such contradictory views would need to be specified.”*

10.1 This ground of the assessee is infructuous in view of our findings on merit of the issue raised by the assessee in its appeals before us and hence, these grounds are dismissed as infructuous.

11. In the result, the appeals of the assessee are allowed and the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 15th Dec, 2022.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 15th Dec, 2022.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.